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265 NLRB No. 186

D--9613
Billings, MT

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

H. F. JOHNSON, INC.

and

Case 19--CA--14062

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS LOCAL 190, AFFILIATED
WITH INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS
OF AMERICA

DECISION AND ORDER

Upon a charge filed on November 9, 1981, by Teamsters, Chauffeurs, Warehousemen and Helpers Local 190, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on H. F. Johnson, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 19, issued a complaint on December 22, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing

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before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that at all times material herein, the Union and Joint Council of Teamsters No. 2 have been the designated exclusive bargaining representative of Respondent's unit employees; that such recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from July 1, 1980, to June 30, 1981; that the Union and Joint Council of Teamsters No. 2, by virtue of Section 9(a) of the Act, have been, and are now, the exclusive representative of Respondent's unit employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and terms and conditions of employment; that on July 1, 1981, upon expiration of the collective-bargaining agreement, Respondent discontinued making pension fund payments for its unit employees to the Western Conference of Teamsters Pension Trust Fund; and that Respondent discontinued such payments without prior notice to the Union and without having afforded the Union and Joint Council of Teamsters No. 2 an opportunity to bargain with respect to its conduct and the effects thereof on the unit employees. The complaint further alleges that Respondent, by the foregoing conduct, has violated Section 8(a)(5) and (1) of the Act. Respondent filed an amended answer to the complaint admitting all of the factual and legal allegations in the complaint.

On October 26, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment on the Pleadings based on Respondent's admissions in its amended answer. Subsequently, on November 1, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment on the Pleadings should not be granted. Respondent did not file a response to the Notice To Show Cause and Respondent previously stated, in a letter to the Acting Regional Director dated October 14, 1982, that it had "no objection to the Board seeking and obtaining a Summary Judgment in this matter."

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

As indicated above, Respondent admits all of the factual and legal allegations in the complaint and has not filed a response to the Notice To Show Cause. The allegations in the Motion for Summary Judgment therefore stand uncontroverted.

In view of Respondent's admissions in its amended answer, the uncontroverted allegations of the complaint are deemed admitted and are found to be true. Accordingly, we shall grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Respondent is, and has been at all times material herein, a Montana corporation with its principal office and place of business at Billings, Montana, where it is engaged in truck transportation of petroleum and petroleum products. During the calendar year ending December 31, 1980, a representative period, Respondent, in the course and conduct of its business operations, had gross revenues in excess of \$50,000 from the transportation of freight and commodities from the State of Montana to points directly outside the State of Montana.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Teamsters, Chauffeurs, Warehousemen and Helpers Local 190, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

At all times material herein, the Joint Council of Teamsters No. 2 has acted for and on behalf of each of its member locals, including the Union, as the collective-bargaining representative

of the unit employees. The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All drivers and helpers employed by the Respondent at its Billings, Bozeman, Butte, Helena, Great Falls, and Missoula, Montana facilities; but excluding all office clerical employees, guards and supervisors as defined in the Act.

At all times material herein, the Union and Joint Council of Teamsters No. 2 have been the designated exclusive collective-bargaining representative of Respondent's employees in the unit described above. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from July 1, 1980, to June 30, 1981. On or about July 1, 1981, Respondent discontinued making pension fund payments for its unit employees to the Western Conference of Teamsters Pension Trust Fund. Respondent engaged in the above conduct without prior notice to the Union and without having afforded the Union or the Joint Council of Teamsters No. 2 an opportunity to bargain as the exclusive representative of Respondent's unit employees regarding such conduct and the effects thereof on the unit employees.

Accordingly, we find that Respondent has, since July 1, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the unit employees, and that, by such refusal, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with the operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act. We shall order that Respondent make its unit employees whole by making all pension fund payments, as provided in the expired collective-bargaining agreement, which have not been paid and which would have been paid absent Respondent's unlawful unilateral discontinuance of such payments.¹

¹ Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld payments. We therefore leave to the compliance stage the question of whether Respondent must pay any additional amounts into the pension trust fund in order to satisfy our "'make-whole'" remedy. These additional amounts may be determined, depending upon the circumstances of each case, by references to provisions in the documents governing the fund and, where there are no governing provisions, by evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. See Merryweather Optical Company, 240 NLRB 1213, 1216, fn. 7 (1979).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. H. F. Johnson, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters, Chauffeurs, Warehousemen and Helpers Local 190, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All drivers and helpers employed by the Respondent at its Billings, Bozeman, Butte, Helena, Great Falls, and Missoula, Montana facilities; but excluding all office clerical employees, guards and supervisors as defined in the Act.

4. At all times material herein, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By discontinuing on or about July 1, 1981, and at all times thereafter, making pension fund payments for its unit employees to the Western Conference of Teamsters Pension Trust Fund without giving notice to the Union and without having afforded the Union or the Joint Council of Teamsters No. 2 an opportunity to bargain as the exclusive representative of Respondent's unit employees regarding such conduct and the

effects thereof on unit employees, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid actions, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, H. F. Johnson, Inc., Billings, Montana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Teamsters, Chauffeurs, Warehousemen and Helpers Local 190, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, by discontinuing making pension fund payments to the Western Conference of Teamsters Pension Trust Fund without giving notice to the above-named Union and without

having afforded the Union or the Joint Council of Teamsters No. 2 an opportunity to bargain regarding such conduct and the effects thereof on unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Make its employees whole by making all pension fund payments, as provided in the expired collective-bargaining agreement, which have not been paid and which would have been paid absent Respondent's unlawful unilateral discontinuance of such payments, and continue such payments until such time as Respondent negotiates in good faith to a new agreement or to impasse.

(b) Post at its Billings, Bozeman, Butte, Helena, Great Falls, and Missoula, Montana, facilities copies of the attached notice marked "'Appendix.'"² Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily

² In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "'POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'" shall read "'POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.'"

posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. December 16, 1982

John H. Fanning, Member

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain with Teamsters, Chauffeurs, Warehousemen and Helpers Local 190, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, by discontinuing making pension fund payments to the Western Conference of Teamsters Pension Trust Fund for our employees in the bargaining unit described below without prior notice to the above-named Union and without having afforded the Union or the Joint Council of Teamsters No. 2 an opportunity to bargain regarding such conduct and its effects on our unit employees. The bargaining unit is:

All drivers and helpers employed by the Employer at its Billings, Bozeman, Butte, Helena, Great Falls, and Missoula, Montana facilities; but excluding all office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole our employees by making all pension fund payments as provided in the expired collective-bargaining agreement, which have not been paid and which would have been paid absent any unilateral discontinuance of such payments until such time as we negotiate in good faith to a new agreement or to impasse.

H. F. JOHNSON, INC.

(Employer)

Dated ----- By -----
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 2948, 915 Second Avenue, Seattle, Washington 98174, Telephone 206--442--7472.